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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 97

THE UNITED STATES, PETITIONER

vs.

PERCY K. HUDSON

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 2, 1936
CERTIORARI GRANTED OCTOBER 12, 1936

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In Court of Claims

Docket No. 42,828

PERCY K. HUDSON, PETITIONER

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed Oct. 11, 1934

To the Court of Claims of the United States and to the Honorable Judges Thereof:

The above-named plaintiff, by Lord, Day & Lord, his attorneys, by this petition respectfully says:

1. This is an action to test the constitutionality of the Silver Purchase Act of 1934 in so far as it attempts to levy and collect a tax on transfers of any interest in silver bullion made and completed prior to the date of enactment of said Act.

2. On May 23, 1934, and May 29, 1934, the petitioner transferred certain interests in silver bullion at a price which exceeded the cost thereof and allowed expenses. Thereafter on June 19, 1934, the Silver Purchase Act of 1934 was approved and became law; and it purported to tax such transfers if made on or after May 15,
2 1934, even though made and completed prior to the date of final approval of said Act. The said Act was originally approved by the House of Representatives on May 31, 1934; it was amended by the Senate and approved by the Senate as amended on June 11, 1934; and the amendments were accepted by the House and the bill as amended was finally approved by it on June 13, 1934.

3. On or about the 30th day of July 1934, the petitioner made his return to the Collector of Internal Revenue of the Second District of New York (the district in which the principal place of business of the petitioner was then located) showing all transfers of any interest in silver bullion made by him after May 15, 1934, and before June 19, 1934, on official forms 4 (silver) and 3-a (silver).

4. Upon said return taxes were assessed against the petitioner in the sum of $4,311, which taxes were paid by the petitioner on or about July 30, 1934, to the Collector of Internal Revenue of the Second District of New York.

5. On information and belief the petitioner avers that the said $4,311 was thereafter turned over and deposited by the Collector of

Internal Revenue to whom said payment was made by the petitioner, into the Treasury of the United States of America, as in the course of his official business.

6. On August 23, 1934, the petitioner duly filed with the Collector of Internal Revenue for the Second District of New York a claim for refund of said $4,311, being the amount of the taxes paid in respect of the transfer of his interests in silver bullion.

3 7. On October 1, 1934, the petitioner's claim for refund was rejected in full by the Commissioner of Internal Revenue and the sum of $4,311 is now wrongfully retained and withheld from the petitioner without his consent and against his will by the United States of America.

8. The provisions of law and Treasury Regulations on which the petitioner relies in support of his claim, are as follows:

Revenue Act of 1926

"SEC. 800. * * * there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule.

"Subdivision 10 of Schedule A of Title VII of the Revenue Act of 1926, as Added by Sections 8 of the Silver Purchase Act of 1934

"10. Silver, and so forth, sales and transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof

4 and allowed expenses, 50 per centum of the amount of such excess. * * * On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the taxes thereon * * * this subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on and after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulation prescribe, and the requirement of a memorandum of such transfer shall not apply * * *."

"Regulations 85 relating to tax on transfers of interest in silver bullion under Title 8, Schedule A, Subdivision 10 of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934.

"Chapter VII, Art. 70. Returns.—Every person who on or after May 15, 1934 and before the enactment of the Silver Purchase Act of 1934, made any transfer of any interest in silver bullion shall, on or before July 31, 1934, file with the Collector for the District in which is located his principal place of business (or if none, his residence) or if he has no principal place of business or residence in the United States, with the Collector at Baltimore, Md.,
5 a return in duplicate under oath on form 4 (silver) showing all such transfers * * *"

"Article 71. *Payment of Tax.*—The total tax shown on the return shall be paid to the Collector at the time the return is filed."

9. The petitioner claims that the above mentioned taxes of $4.311 were unlawfully assessed and that the above quoted provisions of law under which the said taxes were assessed are unconstitutional in so far as they apply to transfers made and completed prior to the enactment or final approval of the Silver Purchase Act of 1934 on June 19, 1934.

10. No other action than as aforesaid has been had on this claim in Congress or in any of the departments. The petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the United States; he has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; he is and always has been the sole owner of the claim here presented; he has made no assignment or transfer of said claim or any part thereof or any interest therein; and he is justly entitled to the amount claimed from the United States of America after allowing all just credits and setoffs.

11. The petitioner believes the facts as herein above stated to be true.

WHEREFORE, the petitioner prays judgment against the United States of America upon the facts and law for $4.311, together
6 with proper interest thereon and his reasonable costs and disbursements herein.

PERCY K. HUDSON,
Petitioner.

LORD, DAY & LORD,
Attorneys for the Petitioner,
25 Broadway, New York, New York.

[*Duly sworn to by Percy K. Hudson, jurat omitted in printing.*]

7 II. *General traverse*

Filed Nov. 20, 1934

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

FRANK J. WIDEMAN,
Assistant Attorney General.

III. *Argument and submission of case*

This case was argued and submitted on merits on June 4, 1935, by Mr. Bernhard Knollenberg, for plaintiff, and by Mr. George H. Foster, for defendant.

8 IV. *Special findings of fact, conclusion of law and opinion of the court by Green, J.*

Filed November 4, 1935

Mr. Bernhard Knollenberg for plaintiff. Mr. Herbert Brownell, Jr., and Lord, Day & Lord were on the briefs.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Frank J. Wideman, for defendant. Messrs. Alanson W. Willcox and Loren P. Oakes were on the brief.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

Special findings of fact

The plaintiff sold futures contracts for the delivery of silver, the details of the said sales being as follows:

Silver futures contracts

No. of ounces	Date bought	Date sold	Cost	Selling price	Allowed expenses	Profit	Tax paid
25,000	5-3-34	5-23-34	$10,950	$11,400	$33.42	$416.58	$208.29
100,000	"	"	43,400	45,300	133.59	1,766.41	883.21
125,000	"	"	54,287.50	56,625	167.01	2,170.49	1,085.25
25,000	"	"	10,860	11,325	33.42	431.58	215.79
75,000	"	"	32,587.50	33,975	100.20	1,287.30	643.65
50,000	"	5-29-34	21,750	22,650	66.81	833.19	416.60
100,000	"	"	43,450	45,300	133.59	1,716.41	858.21
500,000			217,285	226,575	668.04	8,621.96	4,311.00

On July 30, 1934, in obedience to the requirements of the Silver Purchase Act of 1934, the plaintiff filed silver tax returns with the collector of internal revenue for the second district of New York covering all futures transactions in silver bullion consummated by him or his agents for his account between May 15, 1934, and June

19, 1934. The said returns set forth the facts stated above. The total tax liability shown in the returns, i. e., $4,311.00, was paid by the plaintiff on July 30, 1934, to the said collector and deposited by the latter in the Federal Reserve Bank, New York, New York, for the account of the Treasury of the United States.

9 On August 23, 1934, the plaintiff filed an adequate claim for the refund of the tax so paid. This claim for refund was rejected.

Conclusion of law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $4,311, with interest as provided by law.

It is therefore ordered and adjudged that the plaintiff recover of and from the United States the sum of four thousand three hundred and eleven dollars ($4,311), with interest at the rate of six percent per annum from July 30, 1934, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the Revenue Act of 1928.

Opinion

GREEN, Judge, delivered the opinion of the court:

The act of June 19, 1934, known as the Silver Purchase Act of that date, provided for the purchase by the Government of silver, and among other things amended schedule A of title VIII of the Revenue Act of 1926 relating to stamp taxes by adding thereto a provision imposing a tax on "transfers of any interest in silver bullion" if the price exceeds cost thereof and allowed expenses, the rate of the tax being fixed at 50 per centum of the amount of such excess. The statute further provided that the payment of the tax should be made by affixing stamps in value equal to the tax on the transfer to a memorandum made and delivered by the transferor to the transferee. The term "transfer" was defined to mean a sale, agreement of sale, or agreement to sell.

On May 3, 1934, agents of the plaintiff bought in several transactions 500,000 ounces of silver bullion and this silver was sold by plaintiff during the period from May 23, 1934, to May 29, 1934, inclusive. On these sales the plaintiff realized (after deducting allowed expenses) a profit of $8,621.96 of which he made the return required by law and paid a tax in the sum of $4,311. In due time and in proper form the plaintiff filed a claim for refund of this amount based upon the alleged invalidity of the tax.

The plaintiff contends that in the instant case the tax is invalid and unconstitutional for the reason that it was retroactively imposed. This constitutes the sole issue in the case.

The mere fact that a taxing statute has retroactive effect is not sufficient by itself and alone to establish its invalidity. This is shown by numerous decisions cited by counsel for defendant, none of which,

however, as we think, are parallel as to facts with the case now before us.

Counsel for plaintiff also cite many cases in which a tax imposed retroactively was held to be invalid, but in nearly all of these cases the decision was based upon facts in the case then presented to the court and no general rule was laid down. The plaintiff relies largely upon the decisions in Nichols v. Coolidge, 274 U. S. 531, Untermyer v. Anderson, 276 U. S. 440, and Milliken v. United States, 283 U. S. 15. We think putting these decisions together, it may be said that they hold in effect that if at the time a citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by a subsequent statute. In the case of Milliken v. United States, supra, it was said that in Nichols v. Coolidge, supra, and Untermyer v. Anderson, supra, the basis of the decision was "that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax", and by reason of this fact, in both of these cases, the tax was held invalid.

On behalf of the defendant it is contended that these decisions have no application to the case at bar for several reasons which we will next consider.

It is said that the tax was necessary in order to enforce the Silver Purchase Act. A similar argument was made in support of the statute in the Untermyer case, supra, and rejected by the majority of the court. We do not think it necessary to discuss the principles upon which that decision is based as we are clear that in the instant case the tax served no purpose except to add to the revenue of the Government, and the argument of defendant rests on a mistaken premise of fact.

It may be conceded that it was to the interest of the Government to prevent the price of silver which was intended to be brought from being forced up by speculative purchases. But the application of the tax could have only a negligible effect in this respect. It is a matter of common knowledge that the United States produces only a comparatively small portion of the world's stock of silver. The silver required to be purchased must necessarily be obtained from abroad and its price would be determined by what foreign owners thought they could get for it. Counsel for defendant call attention to the fact that after the passage of the act purchases of silver on the New York market dropped off to an inconsiderable amount and it is said that this showed the act was effective. It was—in the way of stopping speculation in silver on the New York market—but it had, of course, no effect on speculation in other markets such as those of Canada and Great Britain. Outside of the United States speculation would still continue, and it would be very easy for an American citizen to make his purchases in Canada. The committee report states in effect that the purpose of the bill was to equitably reimburse the Government for the increase which its

action might bring to the price of silver. It might do this to some small extent, but this is purely a revenue proposition.

What we have said above applies to purchases and sales of silver after the passage of the act and when the Government had begun action thereunder. Then, as we have said above, if one contemplating the purchase of silver knew that a heavy tax would be imposed on any gain which resulted therefrom he would be quite likely to refrain from making the purchase in this country. But when the purchase was made before the silver purchase law was proposed, as it was in the instant case, we are at a loss to understand how putting a tax on the profits which might be made from subsequent
11 sales could by any possibility affect the workings of the act. The purchase had already been made. If it or any number of purchases made before the act was contemplated had any effect upon the price of silver, putting a tax on the sale would not change the result. We may concede, as we have above, that the tax might have some effect in the way of stopping future purchases of silver in this country but after the purchase has been made a tax levied upon the profits therefrom can serve no purpose but to bring some revenue into the Treasury. The market price of silver would remain the same to the Government or any other party and the enforcement of the act would in no way be assisted by the application of the tax under the circumstances presented by the plaintiff's case.

It is also urged on behalf of the defendant that the retroactive feature of the tax must be sustained as an incident to the exercise of the monetary power of Congress. The purchase of silver may be so sustained, but we think it has been shown above that in making the tax apply to purchases made prior to the enactment of the statute nothing was done which in any way assisted in carrying out the objects of the Silver Purchase Act. The particular provision in controversy is therefore not an exercise of the monetary power of the Government but of its taxing power, and this contention also must be overruled.

It is also argued that in its practical effect the tax is one upon income and that being an income tax it can be imposed retroactively.

At the outset it will be observed that the tax is specifically designated as a stamp tax, is paid by means of stamps, the Government itself has administered the act as a stamp tax, and a Treasury decision has been promulgated to the effect that the amount of this tax was deductible in determining the net income of the taxpayer. It is true that the amount of the tax is measured by the profits made, but we do not think this makes it an income tax. So far as we are aware, the precise question now being considered has not been ruled upon in any of the decisions of the Federal courts but in many cases it has been held in effect that the measure of a tax does not determine its nature. This tax is outside of the income tax and in addition thereto. It is plain that Congress did not regard it as an income tax. When Congress considered the provision in question to be a stamp tax and the Government officials so treated it, how could the taxpayer be expected to regard it as an income tax?

It has often been held that the income tax may be levied retroactively, at least so as to include all of the year during which the taxing act became a law. But there is an important difference between the income tax and a tax of the nature involved in the instant case. The income tax is a general tax on all income. It would make no difference to the taxpayer whether he knew in advance that it was to be levied; he would continue his business transactions in the same manner in any event, for it is a continuing tax, usually divided for convenience in collection into periods of one year. But here we have a tax that is levied upon a particular transaction or transactions. It is not an amendment to the income-tax provisions but would be collected if they were all repealed. If the taxpayer had been forwarned the situation would have been very different, for he could then take his choice. He could avoid the risk of loss on the sale and payment of a heavy tax if there was a profit simply by not entering into the transaction, but after he had made the purchase his status was fixed and he was caught by a taxing statute which he had no reason to anticipate.

Counsel for defendant cite some cases in which it has been held that where an excise tax exists with reference to a particular transaction the tax may be increased subsequent thereto and made to retroactively apply to the whole of the current year. Updike v. United States, 8 Fed. (2d) 913, is cited in support of defendant's position and it is assumed that an excess-profits tax is not an income tax for which no authority is found in the opinion rendered thereon. We have no occasion to pass on the question thus raised, for whether the excess-profits tax be considered an income or an excise tax the rule would be the same and for the same reason, as stated in the opinion, namely, that it "applied to all corporate operations within that calendar year." The opinion merely emphasizes the difference in the nature of the tax involved in the instant case which applies only to a certain kind of transactions, and a tax like the income tax or excess-profits tax which applies to all business transactions during the current year.

The fact that the President's message which suggested levying the tax was delivered before the sales were made does not prevent the application of the rule. Plaintiff bought the silver presumably for sale and when the provision for the tax was passed by Congress it imposed a burden upon him which he could not escape if the act was valid. The act which caused the tax to be applied was the act of purchase. We are of the opinion that the case clearly comes under the rule as stated in Milliken v. United States, supra, in that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time he made the purchases and we are therefore constrained to hold that the tax was invalid.

In so doing we are not unmindful of the rule that acts of Congress should not be held invalid except where there is no doubt that they are unconstitutional, but we encounter no doubt in making the deci-

sion. It should perhaps be noted that our conclusion can affect only a very few cases so far as the silver act is concerned. A contrary decision, however, if ultimately sustained, would have a very far-reaching effect in enabling similar retroactive taxes to be imposed on practically every kind of business transaction which involved a purchase and sale.

Judgment will be rendered in favor of plaintiff as prayed in his petition.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice, concur.

13 V. *Judgment*

At a Court of Claims held in the City of Washington on the 4th day of November, A. D., 1935, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $4,311, with interest.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff recover of and from the United States the sum of four thousand three hundred and eleven dollars ($4,311), with interest at the rate of six percent per annum from July 30, 1934, to such date as the Commissioner of Internal Revenue may determine, in accordance with the provisions of subsection (b), section 177 of the Judicial Code, being a part of the Revenue Act of 1928.

VI. *Proceedings after entry of judgment*

On January 3, 1936, the defendant filed a motion for an extension of time within which to file a motion for a new trial, of ten (10) days.

Said motion was allowed by the court on January 3, 1936.

On January 7, 1936, the defendant filed a motion for new trial.

On March 2, 1936, the court, by Green, J., filed the following opinion on the defendant's motion for new trial:

14 VII. *Opinion of the court by Green, J., on defendant's motion for new trial*

Filed March 2, 1936

GREEN, Judge, delivered the opinion of the court:

In the motion for new trial filed by defendant it is argued that the opinion of the court has placed the decision in a large measure upon the date of the purchase rather than the date of the transfer, but it was not intended by what was said in the opinion to make the date of purchase controlling. Such a rule would render an ordinary sales tax invalid as to articles that had been purchased prior to its enactment. The fact that at the time of the purchase of the silver the

plaintiff had not received the slighest intimation that such a tax would be enacted is one of the circumstances of the case which bears on the question of whether the tax, like the retroactive gift tax considered in Untermyer v. Anderson, 276 U. S. 440, is arbitrary and invalid under the due process clause of the Fifth Amendment.

In Milliken v. United States, 283 U. S. 15, the gift tax of the revenue act of 1924 was characterized as "novel." It was indeed an innovation, no such tax ever having been imposed before in this or any other country, although it was subsequently adopted by some other nations. The tax now under consideration was also novel. It was neither an income tax nor an ordinary sales or excise tax.

No such tax had been levied before in the United States nor so
15 far as we can find, in any country. It applied only to a particular kind of transactions and imposed a very heavy tax upon any profits that might be derived therefrom without any reference to other income or losses on the part of the taxpayer. In Untermyer v. Anderson, supra, a tax upon gifts made prior to the passage of the act imposing it was held so palpably arbitrary and unreasonable as to infringe the due process clause of the Constitution, notwithstanding the fact that the bill imposing the tax was introduced before the gifts were made. This case disposes of the contention that the tax under consideration was valid because the President had recommended it in a message presented to Congress before the sales were made upon which the tax was assessed. The mere fact that the tax was retroactive does not by itself and alone render it invalid, but the tax was so novel and, we might say, extraordinary, that the rules laid down in Untermyer v. Anderson, supra, and Milliken v. United States, supra, apply; and, under all the circumstances, its assessment against plaintiff must be held invalid. In connection with the tax it will also be observed that it manifestly was not levied for the purpose of obtaining revenue but for the purpose of putting a stop to certain transactions which in themselves were perfectly legal.

The motion for new trial will be overruled. It is so ordered.

WHALEY, Judge; WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice, concur.

15 VIII. *Order overruling defendant's motion for new trial*

IT IS ORDERED this 2nd day of March, A. D., 1936, that the defendant's motion for new trial be and the same is hereby overruled.

16 [Clerk's Certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File no. 40, 637. Court of Claims. Term No. 97. The United States, petitioner, vs. Percy K. Hudson. Petition for a writ of certiorari and exhibit thereto. Filed June 2, 1936. Term No. 97 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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